

Access

Victims' rights before the International Criminal Court

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Ntaganda before ICC:

A step forward, but a long way to go

Théo Boutruche, REDRESS

Bosco Ntaganda is a notorious rebel leader who later became a General in the Congolese army. In the midst of ongoing hostilities in Eastern Democratic Republic of Congo (DRC), he voluntarily surrendered himself to the US Embassy in Kigali in March 2013, which then transferred him to the International Criminal Court. His initial appearance before the Court on 26 March 2013 in The Hague marks a significant step. Many victims have suffered widespread abuses over the past ten years, allegedly at his behest. Much still remains to be done for these victims and many others in DRC, to obtain justice and reparation.

With the confirmation of charges hearing set for 23 September 2013, a long process starts at the ICC. The modalities of victims' participation at this stage have just been determined, and there already is a key concern concerning the potential scope of the charges. Ntaganda was sought under two arrest warrants issued by the ICC, the first issued in August 2006, for the war crime of recruiting and using children in hostilities, allegedly committed during the Ituri conflict in 2002-3 when he was Deputy Chief of the *Patriotic Forces for the Liberation of Congo* (FPLC) and unsealed in April 2008. The second arrest warrant, issued in July 2012, also relates to crimes committed in 2002-3 in Ituri, extended the charges, covering attacks against civilian populations, pillaging, rape and sexual slavery. However, since 2003, Ntaganda has reportedly been involved in scores of other abuses, including rape, killings, as well as recruitment and use of child soldiers while commanding troops of another armed group, the *National Congress for the Defense of the People* (CNDP). In addition, he has also been reportedly involved in further abuses as a General in the Congolese army, and

more recently in relation to the M23 armed group created in April 2012.

Ntaganda's transfer to the ICC creates high expectations among victims who were unable to participate in the proceedings against Thomas Lubanga due to the narrowness of the charges against him. In order to reflect the full scale of the crimes and victimisation reportedly attributed to Ntaganda in the region, the ICC Prosecutor needs to consider how to bring additional charges against Ntaganda. It is also important that lessons from Lubanga's trial are learned and applied in this case, notably regarding the protection of victims and witnesses and the use of intermediaries.

In as much as Ntaganda's case is a test for the ICC, it also reminds all those advocating for the victims in the DRC of what still needs to happen for justice to be served. The primary responsibility of bringing suspected perpetrators to justice and ensuring that thousands of victims obtain reparation remains with the Congolese authorities. From implementing judgements passed by Congolese courts to carrying out overdue justice and security sector reforms, the DRC government must do more to ensure that Ntaganda's appearance before the ICC is



Bosco Ntaganda appears before the ICC-CPI © Guy Oliver/IRIN

the beginning of a meaningful process leading to justice for victims. •

Kenyatta decision turns spotlight on ICC investigation

Elizabeth Evenson, Human Rights Watch

In March 2013, the Office of the Prosecutor at the ICC announced it was withdrawing charges against Francis Muthaura, Kenya's former cabinet secretary. Muthaura had been accused alongside Kenya's new president, Uhuru Kenyatta, of committing crimes against humanity during the country's 2007-8 post-election violence.

It is the first time the ICC Prosecutor has sought to withdraw charges against an accused. However it is not the Prosecutor's first setback in relation to insufficient evidence to back up cases. The Pre-trial Chamber has declined to send cases against 4 out of 14 defendants to trial. Although the prosecution secured its first conviction -against Thomas Lubanga, a rebel leader in the Democratic Republic of Congo- another former Congolese militia leader, Matthieu Ngudjolo Chui was acquitted on 18 November 2012.

To be sure, these setbacks should be put in a broader context. Proceedings are ongoing in seven other cases. The Trial Chamber recently turned down Kenyatta's request to have the charges against him dropped or reconsidered. Constraints in cooperation, security of staff and witnesses, and resources pose real difficulties for the court, affecting the prosecution and defense teams.

At the same time, the ICC's new chief prosecutor, Fatou Bensouda, has made an important public commitment to improving her office's investigations. Dropping the charges against Muthaura reflects a willingness to take a hard look at the prosecution's ability to prove its cases. Effective investigations and prosecutions are central to the realization of the ICC's mandate to bring fair, credible, and meaningful justice.

A comprehensive look at the challenges faced by the prosecution in its investigations is beyond the scope of this article, but a recent decision in the *Kenyatta* case highlights a possible area for review: should the prosecutor's investigations be more advanced by the "confirmation of charges hearing", a pre-trial step at the ICC which determines whether there is sufficient evidence to send the case to trial?¹

In turning down Kenyatta's petition to drop or reconsider his case, two judges agreed that although the Rome Statute does not preclude continuing investigations, they should be complete as a general rule by the confirmation of charges hearing. They cited language in an ICC appeals chamber decision in the *Callixte Mbarushimana* case.² The trial chamber's third judge disagreed, citing an earlier Appeals Chamber decision in the *Lubanga* case that spoke only of the desirability of investigations being complete by the time of the confirmation hearing. In addition, in his view, any such rule would invite litigation over the prosecution's conduct of its investigations, without clear standards - and possibly without sufficient information given the confidentiality of investigations - to resolve disputes.³

The judge's concurring opinion can be read to caution against micromanagement of the prosecutor's investigations. ICC judges in this decision and in a related one have credited, at least in part, difficulties experienced by the prosecution that may have prevented more substantial investigations of the Kenya cases prior to confirmation.⁴ Nonetheless, there are good reasons to complete investigations as early as possible.

First, most fundamentally, reconstructing complicated crimes is often made only more difficult with the passage of time.



New Prosecution team in place, ICC Prosecutor Fatou Bensouda attending the swearing in of deputy Prosecutor James Stewart © ICC-CPI

Second, in the Kenya cases, the trial dates have been postponed to give the defense more time to prepare, in light of the volume of evidence recently disclosed as a result of the prosecution's continued investigations. Earlier investigations could mean earlier disclosure and fewer delays, consistent with the right to be tried without undue delay.

Third, as another commentator has already noted, the scope of the Kenya cases has narrowed considerably over the course of pre-trial proceedings, with real impact on the rights of victims before the court. The pre-trial chamber found insufficient evidence to retain charges related to crimes committed in certain areas and later restricted the time period for some of the incidents. Some victims initially granted the right to participate will now find themselves outside the scope of the charges.⁵

It is likely that no one size will fit all of the prosecutor's investigations. Moving quickly to secure arrest or, when crimes are ongoing, to prevent new crimes may mean that investigations will be less advanced at the earliest stages. When the investigation concerns past crimes, however, there may be fewer reasons to move forward before an investigation is more fully complete, even if the prosecutor still needs to be able to pursue leads as they arise. In seeking to strengthen her office's investigations, Bensouda should consider what factors have limited investigations at earlier stages and identify whether strategies could be put in place to overcome these obstacles. States Parties should be ready to support necessary changes - whether with increased cooperation or more resources. •

¹ The War Crimes Research Office at American University's Washington College of Law's recently published study also highlights this issue among several others in its broader assessment of the Office's investigations and makes a number of recommendations. See War Crimes Research Office, American University Washington College of Law, "Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor," October 2012, <http://www.wcl.american.edu/warcrimes/icc/documents/ICCReport16.pdf>.

² Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision on defence application pursuant to Article 64(4) and related requests, April 26, 2013, paras. 117-128.

³ Prosecutor v. Kenyatta, ICC-01/09-02/11, Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji, May 2, 2013, paras. 86-100.

⁴ Prosecutor v. Kenyatta, Decision on defense application pursuant to Article 64(4) and related requests, para. 124; Prosecutor v. Kenyatta, ICC-01/09-02/11, Corrigendum to "Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute,'" March 23, 2013, para. 38.

⁵ Mariana Pena, "What about the victims of the post-election violence?," post to "The International Criminal Court Kenya Monitor: A Project of Open Society Justice Initiative" (blog), March 25, 2013, <http://www.icckkenya.org/2013/03/what-about-the-victims-of-the-post-election-violence/>

An International Crimes Division in Kenya's High Court: Meaningful justice or a white elephant ?

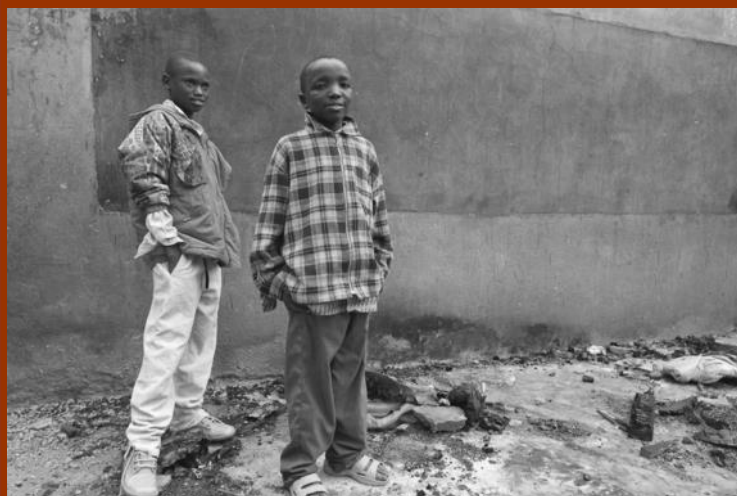
Aimee Ongeso, Kituo cha Sheria

Kenya is in the early stages of establishing an International Crimes Division (ICD) in the Kenyan High Court to prosecute crimes committed during the 2007-8 Post Election Violence, international crimes and other transnational crimes. These efforts are commendable and acknowledged as a brave attempt to address the impunity gap in the country as well as deter crimes of such nature in the future.

However, while the ICD was to be primarily set up to deal with mid and low level perpetrators of Post-Election Violence, a majority of civil society organizations have been taken aback by the expansion of its mandate. There are justified fears that post-election crimes could be relegated or forgotten in this broadened jurisdiction. The scope of the ICD's jurisdiction includes transnational and international crimes that could take place in the future.

The ICD should be seen as complementary to the International Criminal Court (ICC) that only holds those who bear the greatest responsibility to account. In the ICC's Kenyan cases there are only 3 accused facing trial, while significant numbers of people are allegedly implicated. It is impossible for the ICC to try all these individuals, at the same time, the normal domestic courts in Kenya cannot handle all these cases in addition to the other matters brought before them. This means that a huge "impunity gap" prevails at the community level where victims, survivors and perpetrators are forced to co-exist in fear and mistrust. The ICD brings hope in filling this gap and is critical in assisting Kenya to meet its international obligations, using the ICC's definition of the crimes.

However many challenges remain for the ICD to play a role in providing justice and reparation to victims of post-election crimes. Perhaps the most pertinent issue is the fact that the ICD has been created on the basis of the International Crimes Act which came into force in Kenya on January 1, 2009. The



Two boys stand in the remains of their classroom in Rurigi, Rift valley after post-election violence in Kenya © Jerry Riley/IRIN

International Crimes Act is not applicable to the 2007-8 crimes. For post-election crimes to be considered under the

ICD, the International Crimes Act will have to be amended which is quite a cumbersome and tedious process.¹ ICTJ has rightfully pointed out that neither international law nor the ICC Rome Statute regime requires that crimes in question be prosecuted as international crimes.² Therefore a more pragmatic approach would be to prosecute post-election crimes as domestic crimes under the relevant criminal law before a special division of the high court which would specifically deal with post-election cases.

Additionally, it goes without saying that for the ICD to meet international standards it has to be well resourced and receive uncompromised support from the Kenyan government. The Chief Justice acknowledged there will be great challenges in setting up and operationalizing the ICD as the related costs will be enormous. The Kenyan Government is therefore expected to fund the ICD adequately in addition to international donor funding.

The robust interest of the Kenyan Government in setting up the ICD begs more questions than answers. Initially the Kenyan government tried to bring the cases "back home" from the ICC after its failure to establish a local specialized tribunal to deal with post-election violence cases itself.

Then parliament passed a motion urging the government to withdraw from the Rome Statute and repeal the International Crimes Act. The Government also lobbied for support for the UN Security Council to defer the Kenyan cases. Finally, it challenged the admissibility of the Kenyan cases at the ICC, arguing that domestic investigations were ongoing and that Kenyan judicial reforms would ensure a credible domestic accountability process. These arguments were rejected by the ICC and the UN because there was insufficient evidence to show that the Kenyan government was making efforts towards investigating and prosecuting cases. The Kenyan government also made an argument that the Kenyan cases should be tried at the East African Court of Justice and in the African Court of Justice and Human Rights, never mind that these courts did not have this mandate nor the resources to do so.³

From a legal standpoint, it would be impossible to bring the cases back home as they are already at trial stage before the ICC. Politically, it is believed, and rightfully so, that the Government could use the setting up of the ICD to advance its own interests and make an attempt for the ICC cases to be brought home through political lobbying.

Civil society organization's have raised well-grounded fears on the question of investigations. The police, who were heavily implicated in post-election violence related cases do not have sufficient impartiality to investigate crimes committed by the police or State officials. The Commission of Inquiry set up to look into the crimes stated that the involvement of state

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Interview with Herman von Hebel new ICC Registrar

Gaëlle Carayon, REDRESS

Mr von Hebel is from The Netherlands where he studied law and human rights. He has previously served as Registrar of the Special Tribunal for Lebanon, as well as the Special Court for Sierra Leone. He has a keen interest in international justice.

What are your priorities as a Registrar?

First, it is important to recall that the ICC Registrar occupies functions that are quite different from those of the Judges, or the Prosecution. My office works behind the scenes; we are a service provider to the other organs of the Court. As the new Registrar, and considering I have only been in function for a very short time, my priority is to try and establish how the Court has functioned so far, seek feedback from the Prosecutor, judges, counsel and my own office. I will consider what the expectations are and how to continue to improve our work and be more efficient. Another element will also be to ensure a good and transparent relationship with States Parties; to ensure their support and cooperation with the Court.

What do you see as the main challenges faced by the Registry at the moment?

There are many challenges. A major one is ensuring optimal communication. Ensuring there is maximum internal communication: within the Registry, between the sections, towards the Office of the Prosecutor and the Presidency. While we may have different interests, the Court has a duty to speak with one voice. External communication is also important to ensure States Parties are aware of what the Court is doing. There are also challenges in the field, where our staff are on the frontline. We need to ensure that field staff receives the right support from headquarters.

Budget is another challenge for the Court. In my view, budget is not about figures, it is about the vision the Court has and the budget process is about sharing that vision with States Parties and developing a common ground. It is essential that the Court has the absolute trust of States Parties and I hope to improve that trust, showing that the Court is providing value for money, and doing the work it was supposed to be doing when the Rome Statute was established. There are of course always ways to improve and I will look at whether the Registry is currently functioning optimally and where improvements can be made. However prior to instituting changes, I want to understand the organisation better.

How do you see the Registry's role to ensuring meaningful participation of victims ?

The participation of victims is an innovative aspect of the Rome Statute. It has a strong statutory basis. I participated in the Rome Conference which saw the Statute adopted and am a supporter of such participation. However it is also a challenge. We face a situation where a tremendous number of victims reach out to the Court and the question then arises of how to ensure such participation is effective, taking into account the obligation to protect the rights of the Defence and a fair trial. It

is about balancing the various interests to ensure victims can really participate and have a voice in the courtroom. There is no final answer to how to address that challenge. Different approaches are being implemented by the Court and everyone is trying to organise in a better way. At the Special Tribunal for Lebanon, victims also have the ability to participate so I am familiar with that however the comparison can only be limited. The number of potential victims in the Lebanon proceedings is in the hundreds, not thousands. There, the Pre Trial Judge played an important role to ensure effective participation in a uniform way. Victims participated in a single team, with one legal representative and it seemed to work well. To me, the ability of bringing groups of victims together to participate collectively should be looked at more closely. In the end we are all guided by the Statute and I am confident that in the coming years, we will go in the right direction.

How do you see the Court developing its outreach taking into account complex challenges?

As Registrar for the Special Court for Sierra Leone for three years (2006-9) I was impressed by the important role outreach plays. In practice this only represents a little effort but it has such a big impact on affected communities. The amount of positive energy that came out in Sierra Leone was important and the possible benefits of outreach are so interesting. To me it is a core aspect of the ICC's work and need not be too costly. Outreach also plays an important role to ensure an effective dialogue between the ICC, communities and governments. It is not about showing how good the ICC is but rather to give context to the work the Court is doing. It is an important tool in that regard. There will always be those who support and those who criticise the Court; dialogue between these groups is important and outreach plays a central role in that regard.

Specific effort needs to be made to ensure that women and children have access to the ICC's justice. In my experience, there is no conflict where women and children are not amongst the first and most affected. The ICC has an obligation to pay particular attention to reaching out to these groups. This is relevant to outreach efforts but also to ensure their participation in proceedings, protection and care, as appropriate.

What are the most pressing challenges regarding protection of witnesses, victims who appear before the Court and others at risk?

Proceedings without witnesses are inconceivable, thus protection is a pre-condition to the ability of the Court to hold proceedings. There is a constant need to look at how we provide support and protection. The ICC has a team of professionals working hard, in the Hague and in the field, including some who have worked with other tribunals and are thus sharing lessons learnt and best practices. We have an obligation to ensure witnesses feel that they are being protected. As much as possible we try to keep victims and witnesses where they live so that

they can stay in their own environment, and only in exceptional circumstances is relocation considered (though there are hundreds of people who have been relocated). However the Court cannot provide protection without the support of States. It is encouraging that some countries have entered into relocation agreements but we need more of these as well as ad hoc relocation agreements, as the number of witnesses requiring protection over the next few years is likely to increase with the increase in the Court's activities.

How do you foresee continuing the ICC's constructive and long term relationship with NGOs?

My personal relationship with non-governmental organisations (NGOs) goes back to the time the Rome Statute was being negotiated. NGOs played a huge role in that regard. I know that my predecessor valued the relationship and I strongly intend to continue to do so. The Court receives a lot of support from the NGO community and I want to make sure that in the next five years this continues.

What is your vision for the ICC?

On 7 July 1998 when the Rome Statute was adopted, there was a vision of what the Court stood for. It is that vision that I want to uphold. It is a vision of ending impunity, delivering fair trials, ensuring that victims of mass atrocities know and have access to an impartial court, that will be able to address gross violation of human rights and crimes and making sure that serious crimes do not go unpunished. •



Herman von Hebel, ICC Registrar © ICC-CPI

An International Crimes Division in Kenya's High Court...continued from page 3

security agents in the perpetration of sexual violence and the fear of incriminating themselves may partly explain why the police omitted data on sexual violence in the reports they presented to the Commission.⁴ It is therefore crystal clear that for the sake of meaningful justice, there must be credible, impartial and independent investigations and prosecutions. A special prosecutor, independent of the office of the Director of Public Prosecution (DPP) must be created to deal with post-election crimes. However, as the DPP's power to prosecute cases cannot be limited, even by parliament, the DPP would have to restrain himself as a matter of discretion.

To its credit, the subcommittee overseeing the establishment of the ICD has proposed that the prosecuting office be independent of the DPP, have its own programmes and budget, conduct its own investigations and have a team specially trained for the Witness Protection Unit. However, parliament must enact legislation which confers powers of prosecution to an independent prosecutor. The subcommittee has also taken into account the need for training and building capacities as well as recruiting judges afresh.

As the establishment of the ICD is still in the early stages, there is opportunity for public and civil society participation in this process to ensure trust, ownership and the respect of victims' rights. Victims' voices must be central in the administration of justice with respect to post-election related crimes. The ICD

must take into consideration the special needs of victims to guarantee their effective and meaningful participation. This must ensure resonance with the communities most affected by the crimes. The ICD must factor in outreach strategies to demystify the ICD and encourage public participation in this process. Misleading narratives from the field are already on the ground intimating that the ICD is the ICC, or suggesting that the ICD has replaced the ICC. A recent headline by a local radio station stated: *The Chief Justice establishes International Crimes Court*. Therefore there is need for continuous outreach and information sessions to the greater public on the mandate of the ICD.

The establishment of the ICD is a step in the right direction for justice and reparation for victims. However, it also has the potential to fail catastrophically if it does not have the requisite political, financial and technical support from the Government, civil society and the general public. Post-election violence victims are looking up to the ICD, hoping and praying that it is not another white elephant. •

¹ This amendment has to be subjected to debate and three readings in parliament and requires 2/3rd majority for it to be successful. One is not certain if the ICD will be an agenda item in parliament and this means a lot of lobbying will have to be carried out by civil society organizations. These steps are all time consuming and further delay justice.

² See ICTJ 'Prosecuting International and Other Serious Crimes in Kenya' (April, 2013).

³ *Ibid.*

⁴ See Report of the Commission of Inquiry in Postelection Violence (2008).

New victim participation regime in Kenya

Anushka Sehmi¹

On 3 October 2012, the Trial Chamber in the Kenya cases set out the modalities of participation for victims during the Trials.² The system prescribed by the Chamber is novel in many ways: victims will no longer be required to complete the 7-page standard application form³ and if they prefer, victims will be able to simply register with the Registry, by indicating their names, contact details, and information relating to the harm they suffered.⁴ This new approach requires the victims' Common Legal Representative (CLR), who is based in Kenya, to work with the Registry's Victims' Participation and Reparations Section (VPRS) in order to register victims in the case. VPRS is responsible for mapping out victims who fall within the scope of the two cases.⁵

The legal representative of the victims and VPRS have considered various systems to organise victim participation in the Trials while ideally reducing the time spent by Parties and the Judges considering the eligibility of each applicant. The new system combines individual verification of victims and collective registration. In practice, VPRS will arrange meetings of up to 50 victims at a time with the CLR who will then carry out an initial verification to ensure that individual victims present fall within the scope of the case.

In order to qualify as a victim under the ICC's Rules of Procedure and Evidence, an individual, organisation or institution must have suffered harm as a result of an incident falling within the scope of the confirmed charges.⁶ Under the Trial Chamber's Decision of 3 October 2012, "*it will be the responsibility of the Common Legal Representative not to take into consideration the views and concerns of persons whom he or she has reason to believe do not qualify as victims in the present case.*" Therefore, the CLR will have to ensure that he/she only takes into account the views of victims who fall within the scope of the case.⁷ Concretely, it means that the verification process will have to be done on an individual basis, with each victim, through a standard individual declaration. A forum would then be provided for victims who want to tell their stories and share experiences. Those identified as falling outside the scope of the case will be referred to the VPRS staff member present at the meeting for further (separate) consultation and explanation.

However, while this new approach frees up enormous resources in Chambers, VPRS, the Defence and the Prosecution, and can be seen as a cost-saver for the Court and the States Parties, the Decision effectively outsources the process of registering and assessing the victims of the cases to the legal representative's team. The "dual-mandate" of the CLR to present the views and concerns of victims, and to register them, will require significantly greater resources in the field. It will be impossible to carry out the task of registering all victims who are interested in participating (potentially thousands of people) without additional *ad hoc* field staff.⁸ At the same time the CLR has to provide a quality service to the victims and needs to meet with them several times during the case in order to convey their views and concerns.

Aside from logistical and financial considerations, the new approach raises other, more substantive, questions. For example, establishing a causal link between the purported crime and the ensuing harm is critical in order to maintain the integrity of victims' participation in ICC proceedings.



In Kenya, victims of the post election violence are eager to know more About the ICC, outreach session, September 2012 © REDRESS

Without the CLR's active verification that this link exists for victims present at a registration meeting, the credibility of the victim participation regime could be affected. This is further

compounded by the fact that Judges in this case will not review the registration forms. This could lead to parties, or Judges, calling into question assertions made by the CLR on behalf of the victims he/she represents.

Finally treating victims as a mass, so to speak, rather than as individual rights bearers, could set a dangerous precedent for the ICC. Notwithstanding the fact that such uniformity among victims is far from established, the views and concerns of the victims presented by the CLR may be called into question, or given a lesser weight in proceedings as a result. •

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² ICC-01/09-02/11-498, Decision on victims' representation and participation, 3 October 2012.

³ In line with the 3 October 2012 Decision (op.cit), only those victims who want to appear physically before the Court to present their views and concerns would be required to complete the standard application form, see para. 24 of the Decision.

⁴ According to the Chamber, the purpose of this registration is threefold: to provide victims with a channel through which they can formalise their claim of victimhood; to establish a personal connection between the victim and the Common Legal Representative; to assist the Court in communicating with the victims and in preparing the periodic reports, see para. 49.

⁵ For example, in the Kenyatta case, victims of the case are those who have suffered from: murder; rape; forced displacement; and other inhumane acts on 27 and 28 January 2008 in Naivasha, and 24-27 January 2008 in Nakuru.

⁶ 3 October 2012, Decision on victims' representation, op.cit, para. 46.

⁷ Ibid, para. 52.

⁸ The Supplementary Report, para. 55, states that the post of a field assistant is specifically created to assist the legal representative of victims, on an *ad hoc* basis.

Psychological aspects of victim participation in Cambodia's Extraordinary Chambers

Inger Agger¹ & Sotheara Chhim²

Since the start of the proceedings in 2006 of the UN-backed Khmer Rouge Tribunal, victims have been able to participate as “civil parties” in the cases. The inclusion of this type of victim participation in an international criminal trial is an innovative step. It is the first time victims of mass atrocity have been able to apply and be recognised as civil parties in an international trial as independent parties to the proceedings alongside the prosecution and defence. Ninety-three victims participated as civil parties in the Extraordinary Chambers in the Courts of Cambodia's (ECCC) first case against Duch, while 3,850 are participating in the second case. While the civil party participation is pioneering, there has been a constant downgrading of victim participation in the ECCC proceedings, which has caused a degree of frustration among the victims.³

The evaluation of civil party representation has varied. The Transcultural Psychosocial Organisation – Cambodia (TPO), which is providing psychological support for victims testifying before the ECCC, has conducted studies to assess the effect on the victims participating in the first court process against Duch.⁴ TPO found that some victims had beneficial experiences while others felt their suffering had increased. Victims testifying in court experienced a number of stressful events such as the rejection of their application to become a civil party, the lack of financial support for court attendance, false or misplaced expectations of obtaining reparations, security concerns such as the risks of retaliation, the difficulty in recounting painful events and being subjected to cross-examination by the defence. A significant issue has also been the Court's restriction of victims' displays of emotions in the courtroom, and generally the lack of support from the ECCC for victims' desires to establish the “emotional truth”. Finally, the lack of requests for forgiveness by the defendant has been a real source of difficulty for victims.



Ceremony for civil parties held in the “Killing Fields” near Phnom Penh ©

In their article “Confronting Duch: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia”, Eric Stover and others found - based on interviews with seventeen civil parties before and after the first verdict - that civil parties “believed that their participation in the proceedings was meaningful and that justice had been rendered”; and “that their appearance in the courtroom helped to

restore the dignity of their deceased loved ones and to complete their spiritual journeys as Buddhists”.⁵

However, on the other hand Studzinsky, in her article “Victim's participation before the Extraordinary Chambers in the Courts of Cambodia”, found that, “the first experiences from Case 001 have been rather disappointing for the victims”.⁶ Other researchers, including Inger Agger, have found the same divergent pattern: Although victim participation is important, participation alone is unlikely to bring about healing, closure, and reconciliation for the victims. Hopefully, the ECCC will approve the proposal for reparations put forward by civil party lawyers to include psychological rehabilitation in the reparations, such as testimonial therapy.⁷

Interviews by Inger Agger with 27 severely affected victims, two of whom were civil party applicants, showed that victims wanted the top Khmer Rouge leaders to be prosecuted; but most importantly, the leaders should *take responsibility* for their crimes. However, the three (now two) accused in the on-going trials are denying charges, and this might become quite stressful for victims. Observation of the trials and interviews with victims present in the court room also revealed great difficulties for victims to understand the ECCC proceedings.

The challenges of striking the right balance between establishing the “hard facts” and allowing the expression of emotions are difficult to address. Emotional testimony during Case 001 led to repeated requests to victims who testified, to compose themselves and keep to the facts. This challenge is expected to be even greater during the on-going trial, which must be managed efficiently due to the advanced age and fragile health of the defendants, and the large number of civil party applicants. ●

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³ Kroker, P. (2010). Transitional justice policy in practice: Victim participation in the Khmer Rouge Tribunal. *German Yearbook of International Law*, 53, pp. 753 – 791.

⁴ Strasser, J., Poluda, J., Balthazard, M., Chariya, O., Sotheary, Y., Sophea, I., Kok-Thay, E. & Sperfeldt, C. (2010). Engaging communities – easing the pain: Outreach and psychosocial interventions in the context of the Khmer Rouge Tribunal. In K. Lauritsch & F. Kernjak (eds.), *We need the truth: Enforced disappearances in Asia* (pp. 145 – 162). Guatemala: ECAP; Strasser, J., Poluda, J., Sotheara, C., & Pham, P. (2011). Justice and healing at the Khmer Rouge tribunal: The psychological impact of civil party participation. In B. Van Schaack, D. Reicherter & Y. Chhang (eds.), *Cambodia's hidden scars: Trauma psychology in the wake of the Khmer Rouge* (pp. 149 – 170). Phnom Penh: Documentation Centre of Cambodia (DC-Cam)

⁵ Stover, E., Balthazard, M., & Koenig, K.A. (2011). Confronting *Duch*: civil party participation in Case 001 at the Extraordinary Chambers in the Courts of Cambodia. *International Review of the Red Cross*, 93 (882)

⁶ Studzinsky, S. (2011). Victim's participation before the Extraordinary Chambers in the Courts of Cambodia. *Zeitschrift für Internationale Strafrechtsdogmatik*, 10.

⁷ Agger, I., Igreja, V., Kiehle, R. & Polatin, P. (2012). Testimony ceremonies in Asia: Integrating spirituality in testimonial therapy for torture survivors in India, Sri Lanka, Cambodia, and the Philippines. *Transcultural Psychiatry*, 49(3-4): 568-589.

Gender perspectives must be considered in Uganda's new Draft National Transitional Justice Policy

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Efforts to draw together the various transitional justice options for victims of the most serious crimes committed in Uganda seem to finally be yielding some results. However, if efforts are to lead to meaningful changes for victims, political will and appropriate consultations are much needed.

The Justice Law and Order Sector (JLOS) in Uganda has led the process to formulate a National Transitional Justice Policy. A draft policy was finalized in May 2013 and this is in itself welcomed. While a JLOS "consensus building workshop" was held on 21 May 2013 to consult with stakeholders on the draft policy, it is hoped this will mark the beginning of a meaningful consultation process with civil society and victims.

The Uganda Victims Foundation (UVF) has been following this process closely. UVF has stressed that any transitional justice strategy should be holistic and victim-centered, and should fully respect victims' rights to remedy and reparations as prerequisite to achieve truth, justice, accountability and reconciliation for victims of the conflicts in Uganda and for the society as a whole.

In UVF's statement on "*The Need for a Comprehensive Gender Sensitive National Transitional Justice Policy in Uganda*",¹ 29 January 2013, UVF insisted on the need to adopt a gender sensitive approach in designing a national transitional justice policy that reflects specific sexual and gender based crimes committed and ensures that gender is central to designing reparations. If sexual violence is not addressed in a concerted manner that reflects the scale and range of atrocities, violence against women and girls will continue. This is an opportunity to address women's suffering.

It is key that all the mechanisms being advanced in the transitional justice policy take gender based crimes into consideration, looking at the immediate as well as long term impacts on individuals and communities. The UVF statement recalled that:

"A comprehensive gender approach to transitional justice in Uganda requires at least the following mutually reinforcing components:

- *these crimes, harm, and consequences and their gender dimensions must be considered and addressed to ensure that the full scope of victimisation is represented and that the harm is fully repaired, and*
- *Transitional justice mechanisms ought to identify the particular challenges faced by victims of gender based crimes including by establishing gender sensitive procedures and processes.* "

Considering that no specific transitional justice mechanism is to prevail, UVF noted that a gender perspective must be mainstreamed within each mechanism under consideration and must have regard to victims' rights, needs, priorities and interests.

For example, a truth commission should not only include staff with expertise on gender issues and adopt gender friendly procedures to ensure the participation of victims, but should also



Many returning residents are squatting in abandoned buildings after their homes were razed during the violence. © IRIN.

be allocated appropriate resources to carry out a specific gender mandate.

As regards traditional justice mechanisms, these should be carefully reviewed due to the highly male dominated nature of such mechanisms, the cultural obstacles for women and girls to access them, and the preconceptions around gender issues. The use of such mechanisms could be an opportunity for traditional structures to consider these issues.

As regards amnesty, UVF stressed that the previous amnesty act and related processes failed to take into account the needs of victims and was seen as condoning impunity, providing a blanket amnesty. In discussions relating to the possible reinstatement of an amnesty act in Uganda, a gender analysis should be undertaken to assess the potential consequences of the measures envisaged on women, men, boys and girls, taking into consideration their rights to effective remedies such as investigations.

Regarding the critical question of reparations for victims, UVF insists that victims and in particular women and girls should be involved in the design, implementation, monitoring and decision making of the reparation processes in Uganda. The assessment of harm should be comprehensive and gender sensitive, and critically it should ensure that reparation should be transformative and should not restore women and girls to situations that are inherently discriminatory and/or that perpetuate inequalities that enable gender based violence.

JLOS' consensus building workshop on the draft policy was an opportunity to ensure that civil society organizations as well as victims were consulted and their views taken into account. However, in order to consider the many implications of adopting a gender perspective in transitional justice mechanisms, we call on the Government of Uganda to use this opportunity to open a meaningful and transparent consultation process and ensure that victims remain at the center of the upcoming initiatives. •

¹ Available at: [http://www.vrwg.org/UVF/2013 Jan UVF-Final-statement-on-Gender-and-TJ.pdf](http://www.vrwg.org/UVF/2013%20Jan%20UVF-Final-statement-on-Gender-and-TJ.pdf)

Working Group affiliated organisations include:

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